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Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–580 OF 2004
SULONG MATJERAIE, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA
17 APRIL 2012

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Tort — Defamation — Libel — Publication of defamatory article in newspaper — Article on school and legal firm in state propagating Christian religion among Muslims — Whether article directed at appellants — Defences — Qualified privilege — Whether proven — Fair comment — Whether respondents could rely on this defence — Damages — Assessment of — Principles to be applied — Whether appellants entitled to substantial general damages — Whether appellants could succeed in their claim for exemplary and aggravated damages — Whether claim for special damages was supported by conclusive evidence

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The first appellant, a respected educationist and politician, was at all material times the owner of the second appellant, a reputable private school in Kuala Terengganu. The third appellant was the proprietor of the legal firm of Messrs Isaac and Partners. On 4 June 1987, an article written by the second respondent was published by the first respondent in the *Berita Harian*, a newspaper owned by the third respondent. The second respondent's article reported that a school and a legal firm in Kuala Terengganu were propagating the Christian religion among the Muslims. The appellants claimed that this alleged defamatory article was meant and understood to refer to them, although they were not specifically named therein. The appellants then commenced an action in libel against the respondents. It was the appellants' case that they had suffered serious injury to their reputation and business in consequence of the publication of the defamatory article. They thus sought compensation in damages. The respondents contended that the alleged defamatory article did not refer to the appellants. Alternatively, the respondent pleaded that they were protected by the defence of qualified privilege. At the hearing the respondents sought a short adjournment so as to enable them to call their only witness, whose witness statement had already been filed in court. The trial judge however proceeded with the trial by relying on the witness statement. Based on the evidence, the trial judge found that the defamatory words were directed at the appellants. However, upon referring to the witness statement the trial judge concluded that the respondents had successfully made out their defence of qualified privilege and fair comment. The appellants appealed against the judgment of the High Court, on the grounds that the witness statement had been wrongly admitted in evidence without affording the appellants an opportunity to cross-examine the witness. The Court of

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Appeal found that the trial judge had erred in admitting the witness statement and directed the trial judge to make a decision after hearing the oral evidence of the witness who had made the witness statement. The appellants then obtained the leave of the Federal Court to proceed with an appeal against the decision of the Court of Appeal. After hearing this appeal the Federal Court ordered the Court of Appeal to determine the appeal on its merits after excluding in total the witness statement. The case was thus remitted to this court. By the ruling of the Federal Court this court had to now decide the appellants' appeal without regard to the witness statement.

Held, allowing the appellants' claim for damages with costs of RM50,000:

(1) This court agreed with the trial judge and found that as the second and third appellants were the only private school and legal firm owned by Christians in the state, the defamatory article was directed at them (see para 12).

(2) As the trial judge's decision to uphold the defence of qualified privilege was based on the facts contained in the witness statement, it would follow that this defence would fail upon the exclusion of the witness statement. Once false and defamatory words were published, it was presumed that there was malice and the respondents had failed to lead evidence to rebut this presumption (see para 13).

(3) Further, as the respondents had neither pleaded nor relied upon the defence of 'reportage', they could not raise this defence. In any case, the trial judge had found that the defamatory article included allegations of fact without any source, which amounted to an adoption of those facts by the respondents, and that was a ground for denying the defence of 'reportage' (para 15).

(4) The defence of fair comment ought to have been rejected by the trial judge, because this defence was not pleaded. Further, it is trite law that the defence of fair comment was concerned with the protection of comments and not facts. In the present case it was the finding of the trial judge that the defamatory article included allegations of fact and thus the respondents were not entitled to rely on the defence of fair comment. Finally, in upholding the defence of fair comment, the trial judge had failed to appreciate that the article was about Christians such as the appellants propagating the Christian faith among Muslims, which by the law of this country was a criminal act (see para 16).

(5) Applying the principles of law governing the award of damages in libel cases, this court was satisfied that the first and second appellants were entitled to substantial general damages. Considering the standing of the first and second appellants, it should have been apparent to the respondents that the impugned article would attract wide publicity and

be taken seriously by the authorities and the general public. In the present case, the insinuation of anti-Islamic activities, which amounted to criminal conduct, was a very serious libel on the reputation and standing of the first and second appellants respectively. In all the circumstances of this case, it was considered that an award of RM150,000 was a fair sum to be awarded by way of general damages to the first and second appellants. Further, the conduct of the respondents gave rise to the irresistible inference that they indulged in irresponsible journalism to derive pecuniary benefit and this warranted the granting of aggravated and exemplary damages. As such, this court awarded a further sum of RM75,000 to the first and second appellants for aggravated and exemplary damages. However, the second appellant had failed to produce any financial statements and income tax returns to prove its claim for special damages. As such, this court rejected the first and second appellants' claim for special damages, which was computed solely based on the second appellant's fall in student intake (see paras 18–20).

(6) In the case of the third appellant, it was less likely that the defamatory article would have the effect of turning away clients whether of the institutional or individual kind. In the circumstances, this court awarded the third appellant general damages of RM50,000 and aggravated and exemplary damages of RM25,000 (see para 21).

[Bahasa Malaysia summary

Perayu pertama, seorang pengajar dan ahli politik, adalah pada setiap masa matan pemilik perayu kedua, sebuah sekolah swasta yang terkenal di Kuala Terengganu. Perayu ketiga adalah tuan punya firma guaman Tetuan Isaac and Partners. Pada 4 Jun 1987, sebuah artikel yang ditulis oleh responden kedua telah diterbitkan oleh responden pertama dalam *Berita Harian*, sebuah akhbar yang dimiliki oleh responden ketiga. Artikel responden kedua telah melaporkan bahawa sebuah sekolah dan sebuah firma guaman di Kuala Terengganu sedang menyebarkan agama Kristian di kalangan orang Islam. Perayu-perayu mendakwa bahawa artikel yang berunsur fitnah yang dikatakan ini dimaksudkan dan difahamkan merujuk kepada mereka, meskipun mereka tidak dinamakan secara khusus di dalam artikel tersebut. Perayu-perayu kemudian telah memulakan tindakan libel terhadap responden-responden. Ini adalah kes perayu-perayu bahawa reputasi dan perniagaan mereka terjejas akibat penerbitan artikel berunsur fitnah tersebut. Mereka dengan itu telah memohon pampasan ganti rugi. Responden-responden berhujah bahawa artikel berunsur fitnah yang dikatakan itu tidak merujuk kepada perayu-perayu. Secara alternatif, responden memplidkan bahawa mereka dilindungi oleh pembelaan perlindungan bersyarat. Semasa perbicaraan responden-responden memohon penangguhan singkat bagi membolehkan mereka memanggil satu-satunya saksi mereka, yang mana kenyataan saksi tersebut telah pun difailkan di mahkamah. Hakim perbicaraan walau

bagaimanapun telah meneruskan perbicaraan dengan bergantung kepada kenyataan saksi tersebut. Berdasarkan keterangan, hakim perbicaraan mendapati bahawa perkataan-perkataan berunsur fitnah ditujukan kepada perayu-perayu. Walau bagaimanapun, setelah merujuk kepada kenyataan saksi hakim perbicaraan memutuskan bahawa responden telah berjaya membuktikan pembelaan perlindungan bersyarat dan komen adil mereka. Perayu-perayu telah merayu terhadap penghakiman Mahkamah Tinggi, atas alasan bahawa kenyataan saksi telah salah diterima sebagai keterangan tanpa memberikan peluang perayu-perayu untuk memeriksa balas saksi. Mahkamah Rayuan mendapati bahawa hakim perbicaraan terkhilaf dalam menerima kenyataan saksi itu dan mengarahkan hakim perbicaraan, membuat keputusan setelah mendengar keterangan lisan saksi yang telahpun membuat kenyataan saksi. Perayu-perayu kemudian telah memperoleh kebenaran Mahkamah Persekutuan untuk meneruskan rayuan terhadap keputusan Mahkamah Rayuan. Setelah mendengar rayuan ini Mahkamah Persekutuan memerintahkan Mahkamah Rayuan menentukan rayuan atas meritnya selepas mengecualikan kenyataan saksi tersebut. Kes tersebut dengan itu telah diremitkan ke mahkamah ini. Atas keputusan Mahkamah Persekutuan mahkamah ini hendaklah sekarang memutuskan rayuan perayu-perayu tanpa mengambil kira kenyataan saksi tersebut.

Diputuskan, membenarkan tuntutan perayu-perayu untuk ganti rugi dengan kos RM50,000:

(1) Mahkamah ini bersetuju dengan hakim perbicaraan dan mendapati bahawa oleh kerana perayu-perayu kedua dan ketiga adalah satu-satunya sekolah swasta dan firma guaman yang dimiliki oleh penganut Kristian dalam daerah tersebut, artikel berunsur fitnah tersebut ditujukan kepada mereka (lihat perenggan 12).

(2) Oleh kerana keputusan hakim untuk mengekalkan pembelaan perlindungan bersyarat adalah berdasarkan fakta yang terkandung dalam kenyataan saksi tersebut, adalah diikuti bahawa pembelaan ini akan gagal dengan pengecualian kenyataan saksi tersebut. Setelah perkataan-perkataan berunsur palsu dan berniat jahat dan responden-responden telah gagal untuk mengemukakan keterangan untuk mematahkan andaian ini (lihat perenggan 13).

(3) Selanjutnya, oleh kerana responden-responden telah memplidkan atau bergantung kepada pembelaan laporan itu, mereka tidak boleh menimbulkan pembelaan ini. Dalam apa keadaan, hakim perbicaraan telah mendapati bahawa artikel berunsur fitnah itu termasuklah dakwaan fakta tanpa apa-apa sumber, yang membentuk fakta yang digunakan oleh responden-responden, dan itu merupakan alasan untuk menafikan pembelaan laopran tersebut (lihat perenggan 15).

(4) Pembelaan komen adil patut ditolak oleh hakim perbicaraan, kerana

pembelaan ini tidak diplidkan. Bahkan, adalah undang-undang tetap bahawa pembelaan komen adil adalah berkaitan perlindungan komen dan bukan fakta. Dalam kes ini adalah penemuan hakim perbicaraan bahawa artikel berunsur fitnah itu termasuklah dakwaan fakta dan oleh itu responden-responden tidak berhak mendapat pembelaan komen adil. Akhirnya, dalam mengekalkan pembelaan komen adil itu, hakim perbicaraan telah gagal untuk menyedari bahawa artikel tersebut adalah tentang Kristian seperti perayu-perayu yang menyebar ajaran Kristian di kalangan umat Islam, yang mana dari segi undang-undang adalah tindakan jenayah (lihat perenggan 16).

(5) Dengan menggunapakai prinsip-prinsip undang-undang yang mengawal award ganti rugi dalam kes libel, mahkamah ini berpuas hati bahawa perayu-perayu pertama dan kedua berhak mendapat ganti rugi am. Berdasarkan pendirian perayu-perayu pertama dan kedua, adalah jelas kepada responden-responden bahawa artilel yang dipersoalkan akan menarik perhatian awam dan diambil serius oleh pihak berkuasa dan orang awam. Dalam kes ini, gerakan aktiviti anti-Islam, yang membentuk tindakan jenayah, adalah libel serius ke atas reputasi dan nama baik perayu-perayu pertama dan kedua masing-masingnya. Dalam keseluruhan keadaan kes ini, award RM150,000 adalah dianggap jumlah adil untuk diawardkan melalui ganti rugi am kepada perayu-perayu pertama dan kedua. Selanjutnya, perlakuan responden-responden menimbulkan inferens yang tidak boleh disangkal bahawa mereka terlibat dalam penulisan tidak bertanggungjawab untuk memperoleh ganjaran wang dan ini mewajarkan pemberian ganti rugi tambahan dan teladan. Oleh itu, mahkamah ini memberi lagi award sejumlah RM75,000 kepada perayu-perayu pertama dan kedua untuk ganti rugi tambahan dan teladan. Walau bagaimanapun, perayu kedua telah gagal untuk mengemukakan apa-apa penyata kewangan dan hasil cukai pendapatan bagi membuktikan tuntutannya untuk ganti rugi khas. Oleh itu, mahkamah ini menolak tuntutan perayu-perayu pertama dan kedua untuk ganti rugi khas, yang dikira semata-mata berdasarkan kegagalan perayu kedua dalam pengambilan pelajar (lihat perenggan 18–20).

(6) Dalam kes perayu ketiga, tidak mungkin artikel berunsur fitnah itu memberi kesan pelanggan yang menarik diri sama ada yang berbentuk institusi atau individu. Dalam keadaan berikut, mahkamah memberi award kepada perayu ketiga ganti rugi am RM50,000 dan ganti rugi tambahan dan teladan RM25,000 (lihat perenggan 21).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Bonham-Carter v Hyde Park Hotel (1948) 64 TLR 177 (refd)

Datuk Harris Mohd Salleh v Datuk Yong Teck Lee [2012] MLJU 166, HC (not folld)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [1995] 2 MLJ 493; [1995] 2 CLJ 912, CA (not folld)
Neeld & Ors v Western Broadcasting Co Ltd (1976) 65 DLR (3d) 574 (folld)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (refd)
Roberts and another v Gable and others [2008] QB 502, CA (not folld)
Silkin v Beaverbrook Newspapers Ltd [1958] 1 WLR 743, HL (refd)

Legislation referred to
Sedition Act 1948 ss 2, 3, 4

Muhammad Shafee Abdullah (R Vasanthi with him) (Shafee & Co) for the appellants.
Harjinder Kaur (Josephie Sui with her) (Sharizat Rashid & Lee) for the respondents.

Anantham Kasinather JCA (delivering judgment of the court):

PARTIES

[1] The first appellant was at all material times the owner of the second appellant, a private school in Kuala Terengganu. The third appellant is the proprietor of Messrs Isaac & Partners, a firm of advocates and solicitors.

[2] The first respondent was the publisher of the newspaper *Berita Harian* which published the article in its 4 June 1987 issue. The second respondent was the author of the article and the third respondent the company that owned the newspaper.

BACKGROUND FACTS

[3] On 4 June 1987, an article titled 'Sekolah Swasta, Firma Guaman Disiasat. Markas Sulit Sebar Kristian' was published in the *Berita Harian*. Alleging that the article was defamatory of them, the first and second appellants filed High Court Suit No S2(S1)–23–16 of 1995 and the third appellant High Court Suit No S1–23–17 of 1995 against the respondents. Both suits were consolidated on 21 September 1998.

[4] The contents of the alleged defamatory article in the *Berita Harian* were as follows:

A Sebuah sekolah swasta dan fima guaman di sini dikatakan menjadi pusat penyebaran agama Kristian kepada orang Islam di negeri ini yang dibuat secara senyap dan sulit.

Pusat itu mendapat pelbagai kemudahan dan sumber kewangan dari luar untuk membiayai kegiatannya yang dikatakan sudah dapat mengkristiankan beberapa keturunan Melayu di sekitar Bandar Kuala Terengganu.

Berita Harian difahamkan Jabatan Hal-ehwal Agama Terengganu (JHEAT) sedang menyiasat kegiatan yang dijalankan oleh sekolah swasta dan firma itu selepas mendapat maklumat daripada orang ramai.

Pusat itu dikatakan mula menyemaikan nilai-nilai agama Kristian kepada beberapa pelajar dan kakitangan mereka sejak beberapa tahun lalu.

Sumber-sumber berkata orang Islam yang terbabit dengan gerakan Kristian itu, diberi ceramah secara bersembunyi. Biasanya mereka dijemput pada waktu malam menghadiri majlis sosial yang diadakan.

Pendakyah Kristian itu juga menawarkan pelbagai hadiah lumayan dan orang Islam yang terikut dengan gerakan itu sanggup berkahwin dengan gadis beragama Kristian. Walaupun undang-undang di negeri ini tidak membenarkan sebarang tempat ibadat didirikan oleh mana-mana kumpulan agama selain daripada Islam, tanpa kebenaran kerajaan negeri, tetapi beberapa pusat pengembang agama Kristian sudah wujud di Bandar ini.

Kumpulan itu dikatakan menyewa bangunan-bangunan tertentu yang dijadikan pusat ceramah dengan menjemput orang ramai menghadiri perjumpaan yang diadakan.

Kerajan negeri juga difahamkan sudah diberitahu mengenai perkara itu. Bagaimanapun jurucakapnya tidak mahu membuat apa-apa ulasan setakat ini.

Sumber itu berkata JHEAT sudah menghantar beberapa pegawai penguatkuasa penyiasat perkara itu dan keputusannya mungkin dapat diketahui tidak lama lagi.

Sebelum ini, JHEAT sudah mengingatkan umat Islam di negeri ini supaya berwaspada terhadap gerakan dakyah Kritian yang sedang pesat di negeri ini sekarang.

Khutbah Hari Raya Aidilfitri yang dibaca di masjid-masjid di seluruh negeri, mengingatkan umat Islam, supaya berjaga-jaga terhadap gerakan yang dijalankan dengan amat licin dan teratur itu.

THE APPELLANTS' CASE

[5] The gist of the appellants' complaint is that the article in its natural and ordinary meaning was meant and understood to refer to the appellants, although they were not specifically named therein. The appellants claimed that in consequence thereof they suffered serious injury to their reputation and

business and therefore ought to be compensated in damages.

THE RESPONDENTS' CASE

[6] The respondents did not deny that the article was published by the first respondent, but contended that it did not refer to the appellants and that it was, in any event, not defamatory of the appellants. The respondents also contended that in any case they were protected by the defence of qualified privilege.

HISTORY OF THE CONSOLIDATED SUITS

[7] Upon the appellants closing their case on 9 March 2004, counsel for the respondents sought a short adjournment to enable the respondents to call their only witness. The position with this witness was that although his witness statement had been filed with the court, he was not available to attend court on that day. Hence, the request for the short adjournment. The learned trial judge resolved to treat the witness statement as deemed read and proceeded with the trial notwithstanding the clear intention of counsel for the appellants to cross-examine this witness. The learned trial judge thereafter produced his judgment and written grounds on 25 October 2005. The judgment of the High Court included references to the contents of this witness statement and to the documents referred to therein.

[8] Quite naturally one of the grounds of appeal to the Court of Appeal against the decision of the learned trial judge was that His Lordship had wrongly admitted in evidence the witness statement of the only witness of the respondents. The prejudice being that counsel for the appellants was denied the opportunity to cross-examine this witness. The Court of Appeal agreed with counsel for the appellants that the learned trial judge erred in having admitted in evidence this witness statement. The Court of Appeal consequently ordered that the matter be remitted to the learned trial judge to enable the only witness of the respondents to be cross-examined by counsel for the appellants. The order of the Court of Appeal included a directive that the learned trial judge make a decision after hearing the oral evidence of this witness.

[9] This decision of the Court of Appeal formed the subject matter of an application for leave to the Federal Court by the appellants. The appellants' contention before the Federal Court was that the proper order which the Court of Appeal ought to have made upon the exclusion of the witness statement was for the Court of Appeal to decide the appeal without regard to the witness statement and not remit the matter to the High Court. The Federal Court after granting leave thereafter delivered its decision on 10 October 2011 accepting the submission of counsel for the appellants that the proper order which the

Court of Appeal ought to have made was for it to determine the appeal on its merits after excluding in total the witness statement. The Federal Court in its judgment pronounced on 10 October 2011 directed the Court of Appeal to determine the appeal against the judgment of the High Court of 25 October 2005 without regard to the witness statement and all other additional evidence.

FINDINGS OF THE HIGH COURT JUDGE

[10]

(a) That the words complained off in the article could reasonably be understood to refer to the appellants. The learned trial judge opined that although there was no express reference to the appellants in the article, in cases where it is not expressly clear on the face of the article that the words refer to the appellants, the appellants may show it by other means. The 'other means' which appealed to the learned trial judge was the unchallenged evidence that the second appellant and the law firm of the third appellant were the only private school and legal firm respectively which were owned by Christians in the state. Since the respondents led no evidence of their own to rebut the evidence led by the appellants on this matter, the learned trial judge's finding was that the defamatory words were directed at the appellants;

(b) As regards the defence of justification, the learned trial judge observed that the article took the form of a report based on sources from which the contents had been derived as well as the respondents own direct assertions. According to the learned trial judge, these direct assertions included the claim that the second appellant had become a centre for promoting Christian activities over a period of time among Muslims and which activities had resulted in it successfully converting Muslims to Christians in the city of Kuala Terengganu. The centre according to this article was able to undertake and achieve this objective by virtue of being the beneficiary of facilities and financial support from outside. One other direct assertion was the allegation that Christian speakers offered generous prizes for Muslims to be involved in the movement including encouraging Muslims to marry Christian women. The learned trial judge dismissed the defence of justification since the direct assertions were not attributed to a source and no evidence was led to substantiate the truth of these assertions (see p 30);

(c) The learned trial judge acknowledged that the defence of qualified privilege is premised on a moral duty to inform the public upon a matter of public interest. The learned trial judge proceeded to take judicial notice that the subject of converting Muslims to Christians is a matter of public interest in Malaysia generally and, in Terengganu, in particular, since Muslims form the majority of the people in that State. His Lordship

opined that genuine journalism imposed a moral duty on the respondents to inform the public on such matters. Against this background, the learned trial judge examined the witness statement provided by the respondents' only witness and noted that the witness had gone to the Abidin Mosque, heard the *khutbah Aidilfitri*, met and interviewed an officer of Jabatan Hal Ehwal Agama Terengganu ('JHEAT') before writing the offending article. His Lordship concluded that to the extent that the article in effect represented the views of the officer of the JHEAT, the respondents had a moral duty to inform the public on this matter of public interest. It was the finding of the learned trial judge that upon the respondents successfully making out their defence of qualified privilege through the witness statement, the burden shifted to the appellants to prove express malice. Since the appellants had not pleaded express malice by way of reply, the learned trial judge dismissed the appellants' claim on the ground that the respondents had made out the defence of qualified privilege; and

(d) The learned trial judge in para 49 of His Lordship's judgment also upheld the defence of fair comment. The basis for His Lordship upholding this defence was because the appellants did not plead express malice on the part of the respondents in the publication of the article.

DECISION OF THE COURT

[11] Our task in this appeal has been made considerably easier by the ruling of the Federal Court that we are to decide this appeal without regard to the witness statement and the additional evidence referred to in the witness statement ie the *Khutbah Aidilfitri Kertas Kerja* and statement of the Menteri Besar.

DEFENCE OF JUSTIFICATION

[12] As regards the defence of justification, we agree with the finding of the learned trial judge that the defamatory article was directed at the appellants. In our judgment, this finding was justified once the respondents led no evidence to refute the evidence of the appellants that the second and third appellants were the only private school and legal firm respectively owned by Christians in the state.

DEFENCE OF QUALIFIED PRIVILEGE

[13] As regards the defence of qualified privilege, since the learned trial judge's decision to uphold the defence of qualified privilege was solely based on the facts contained in the witness statement and the documents referred to

therein, in our judgment, it must necessarily follow that the defence of qualified privilege fails upon the exclusion of this evidence. In this case, the presumption adverted to by the learned trial judge in para 46 of His Lordship's judgment that:

> if false and defamatory words are published, malice is presumed.

must prevail once the witness statement is excluded. In other words, to succeed in the defence of qualified privilege, the respondents ought to have led evidence to rebut this presumption. This they failed to do.

[14] Learned counsel for the respondents submitted that the defence of qualified privilege must no longer be considered in the framework of the old cases since the decision of the House of Lords in the case of *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609. According to counsel, following this decision the law relating to the defence of qualified privilege has now evolved to an extent whereby responsible journalism did not require verification of the truth. Learned counsel relied on the passage:

> I am not satisfied, without lingering doubts which need be resolved in favour of publication, that, taking the article as a whole and making allowance for the sarcastic speculation about possible police interest, the Defendants did not adopt the allegation of wrongdoing as their own. This was attributed neutral reporting of a story in the public interest. In was proper reportage as that defence must now be understood (and now that it has a firm place in the libel lexicon, there should no longer be any need to italicize the word). Consequently responsible journalism did not require verification of the truth.

in the judgment of Ward LJ in the case of *Roberts and another v Gable and others* [2008] QB 502 at p 530 in support of this proposition. On the subject of the defence of 'reportage', Ward LJ further opined that:

> to qualify as a reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the thrust of the statements, but the fact that they were made (see p 527 of the reported judgment of the court).

His Lordship further acknowledged that this defence will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and natural way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check the accuracy of his report.

[15] With respect, in our judgment, the aforesaid pronouncements of Ward LJ are not an authority for the proposition contended by counsel for the respondents. We opine to this effect because the pronouncements of Ward LJ has its origins in the pronouncements of Lord Nicholls in the celebrated House of Lord's case of *Reynolds v Times Newspapers Ltd and others* where Lord

Nicholls cited ten grounds which had to be taken into consideration when considering the defence of 'reportage', (see p 626 of the reported judgment of the court). That Ward LJ did not intend to depart from the pronouncements of Lord Nicholls is evident from a careful examination of the passage concluding with the words 'Consequently responsible journalism did not require verification of the truth' (cited in para 14 above).

In other words, on the particular facts of this case, Ward LJ concluded that the ten grounds pronounced by Lord Nicholls had been satisfied notwithstanding that no verification had taken place. In this respect, it must be borne in mind that applying the criteria pronounced by Lord Nicholls, verification may not be necessary in cases of urgency and/or when no part of the article is adopted by the author and publisher of the article. On the particular facts of this case, with respect, we do not see the relevance of this submission of learned counsel for the respondents since the defence of 'reportage' was neither pleaded nor relied upon by the respondents. Furthermore, it was the finding of the learned trial judge that the defamatory article included allegation of facts without any source and this, in our judgment, amounted to an adoption of those facts by the respondents, a ground for denying the defence of 'reportage'.

DEFENCE OF FAIR COMMENT

[16] As regards the defence of fair comment, which found favour with the learned trial judge, we agree with counsel for the appellants that this defence ought to have been rejected by the learned trial judge for three reasons. First, this defence was not pleaded. Secondly, it was the finding of the learned trial judge that the defamatory article included allegation of facts without disclosure of the sources for such facts and which facts the appellants never sought to justify. It is trite law that the defence of fair comment is concerned with the protection of comment and not facts. Diplock J in *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 at p 747 put it this way:

> It is important to keep in mind that his defence is concerned with the protection of comment, not imputations of fact. If the imputation is not of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made; see the discussion in *Duncan and Neill on Defamation* (2nd Ed), 19830 pp 58–62).

Thirdly, in upholding the defence of fair comment, the learned trial judge failed to appreciate that the entire article is about Christians such as the appellants propagating the Christian religion among the Muslims which by the law of this country is a criminal act (see s 4 of the Sedition Act 1948 read with

ss 2 and 3 of the same Act).

DAMAGES

[17] A court of law awards damages to the victim of a libel not only to remedy his distress and loss following from the libel but also to vindicate his reputation. In an appropriate case a substantial award is justified to send a message to the world that the imputation was untrue, even if it does so indirectly (see *Gatley on Liable and Slander* (11th Ed), p 263). This court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912 acknowledged that such a victim is entitled to an award of aggravated and exemplary damages when the plea of justification fails by adopting as correct the following pronouncements in the judgment of Bouck J in *Neeld & Ors v Western Broadcasting Co Ltd* (1976) 65 DLR (3d) 574, at p 576:

> As I understand the law the measure of damages must bear some relation to the actual standing and reputation of the plaintiffs in the community prior to the libel. The higher the reputation the greater the damages. Of course the precise nature of the libel is also relevant. A person with a poor reputation is not defamed if the truth is told of him. The more the libel gets away from the truth the greater is the effect of the award of damages. The closer the libel is to the truth the less the damages must be (Emphasis added.)

[18] Applying the aforesaid principles of law governing the award of damages in libel cases, we are satisfied that the first and second appellants are entitled to substantial general damages. We opine to this effect because there is uncontroverted evidence of the esteemed position enjoyed by the first appellant in the community as a respected educationist and a politician at the material time. The second appellant was a reputable school which had been in existence since 1932. In the context of Malaysia being a Muslim country and the State of Terengganu being populated largely by Muslims, it should have been apparent to the respondents that the impugned article would attract wide publicity and would be taken seriously by the authorities and the general public. That the article did produce the intended effect is evident from the investigations conducted by the authorities following the publication of the article and the loss in student enrolment suffered by the second appellant. We accept the evidence of the first appellant that his reputation suffered following the publication and the status of the second appellant eroded. In the present case, the insinuation of criminal conduct was a very serious libel on the reputation and standing of the first and second appellants respectively. In all the circumstances of this case, we consider an award RM150,000 to be a fair sum to be awarded by way of general damages to the first and second appellants. We are conscious of the considerably higher award made recently by the High Court of Kota Kinabalu in the unreported case of *Datuk Harris Mohd Salleh v*

Datuk Yong Teck Lee. We are not inclined to follow the decision of the High Court in that case for two reasons. First, the sting of the article in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee* was the claim that Dato Harris Mohd Salleh is a murderer. With respect, such an allegation has far more venomous connotations than the connotations contained in the impugned article. Secondly, the learned trial judge in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee* case based his decision entirely on the high award adopted by this court in the case of *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun*. In our judgment, the award of a sum running into millions of dollars in the case of *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* was made during a period of unrestrained excesses by the judiciary and consequently not one which we are inclined to follow.

[19] We award the sum of RM75,000 by way of aggravated and exemplary damages to the first and second appellants following the adoption by this court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* of the principle of law that:

> The more the libel gets away from the truth the greater is the effect on the award of the damages.

On the facts of this case, the respondents after having made the very serious libel of the first and second appellants being involved in criminal conduct made no attempt to justify their conduct when provided with the opportunity in court. The respondents made no serious effort to defend their position by calling witnesses and to add insult to injury refused to proffer an apology. This conduct of the respondents gives rise to the irresistible inference that they indulged in irresponsible journalism to derive pecuniary benefit, a basis in itself to warrant the granting of aggravated and exemplary damages.

[20] We reject the first and second appellants' claim for special damages as we are not satisfied that the loss purportedly suffered by them has been presented in a manner to enable us to compute the precise losses suffered by the second appellant. We acknowledge the reduction in student enrolment in the years immediately following the publication of the article. However, in our judgment, to enable us to compute the losses in monetary terms, it is essential for the second appellant to prove its losses by producing financial statements such as the profit and loss account; the balance sheet and the income tax returns of the second appellant. The first and second appellants cannot expect this court to compute their losses based solely on the fall in student intake. The Federal Court in *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 approved Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177, 178 that:

> The plaintiff's must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages', They have to prove it'

We reject the first and second appellants' claim for special damages in the same ground.

[21] As regards the third appellant, in our judgment, his position is materially different from that of the first and second appellants. It is to be expected that Muslim parents would have refrained from sending their children to the second appellant after reading the impugned article that the school and its principal were indulging in anti Islamic activities. In the case of the third appellant, he was operating a law firm and, in our judgment, it is less likely that many of the third appellant's clients whether of the institutional or individual kind would have been influenced to the same extent to avoid business dealings with the third appellant. In the circumstances, we award general damages of RM50,000 and aggravated and exemplary damages of RM25,000 to the third appellant.

[22] Accordingly, we allow this appeal with costs here and below and make the following orders:

(a) the order of the High Court judge of 20 May 2004 is hereby set aside;

(b) that the respondents pay general damages of RM150,000 to the first and second appellants in the aggregate;

(c) that the respondents pay exemplary and aggravated damages of RM75,000 to the first and second appellants in the aggregate;

(d) that the respondents pay the sum of RM50,000 by way of general damages to the third appellant;

(e) that the respondents pay exemplary and aggravated damages of RM25,000 to the third appellant;

(f) that the respondents pay interest at the rate of 4%pa on the judgment sum payable pursuant to paras b, c, d and e above from 20 May 2004 till realisation;

(g) that the respondents pay costs of RM50,000 to the appellants as costs here;

(h) that the deposit is refunded to the appellants; and

(i) that the costs payable by the respondents to the appellants in respect of the proceedings before the High Court be taxed on a party and party basis by the learned deputy registrar.

Appellants' claim for damages allowed with costs of RM50,000.

Reported by Kohila Nesan